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STATE OF WASHINGTON
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NO. 87417-4

SUPREME COURT
OF THE STATE OF WASHINGTON

EVAN SARGENT,

Petitioner,

v.

SEATTLE POLICE DEPARTMENT,

Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON ASSOCIATION OF
PROSECUTING ATTORNEYS

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I. INTRODUCTION

The Washington Association of Prosecuting Attorneys (WAPA) submits this amicus brief. As described in the accompanying Motion to File Amicus Brief, WAPA has an interest in maintaining the integrity of records contained in the files of open, active criminal investigations when those records are requested under the Public Records Act (PRA).

II. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys (WAPA) represents the elected prosecutors of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and all gross misdemeanors and misdemeanors charged under state statutes. Those persons are also the legal advisors to the sheriffs. *See* RCW 36.27.020(2).

WAPA is interested in cases that impact the ability of law enforcement to investigate crimes and of prosecutors to prosecute crimes. The resolution of this case involves an interpretation of RCW 42.56.240(1), a statute that directly impacts the integrity of open, active criminal investigations and their accompanying prosecutions.

III. STATEMENT OF FACTS

The Seattle Police Department and Petitioner have presented the facts relevant to this case, with citations to the record. In short, for purposes of this brief, this case involved an investigation that was

forwarded to the prosecuting attorney for a “rush filing” within 48 hours because the suspect, Petitioner Evan Sargent, was in custody. CP 141-142; CrR 3.2.1(a). The rush filing was declined and the case was returned to the police department for further investigation. CP 142. The police department continued its investigation. While that investigation was open and active, the suspect submitted a request under chapter 42.56 RCW for a copy of the investigative file. CP 111. His request was denied pursuant to RCW 42.56.240(1), the “investigative exemption”, as the investigation was open and active. CP 116-117.

IV. ISSUE

Whether the investigative exemption, which protects investigative records the nondisclosure of which is essential to effective law enforcement, should apply to an investigative file when a case has been declined for rush filing and continues to be open, actively investigated by a law enforcement agency and an enforcement action is contemplated?

V. ARGUMENT

Counties routinely deal with the scenario presented by this case: a case is forwarded to the prosecutor for rush filing, the rush filing of charges is declined, the file is returned to the law enforcement agency for additional investigation, the prosecuting attorney’s involvement ceases, and the investigation re-commences. This process respects the rights of

the suspect while protecting the public's right to have a complete investigation conducted into criminal allegations. The fact that the records have temporarily touched the hands of the prosecutor does not impact the analysis under RCW 42.56.240(1) as to whether the nondisclosure is essential to effective law enforcement.

RCW 42.56.240(1) acts as a "broad categorical exemption" that protects from disclosure under the PRA "all information contained in an open active police investigation". *Newman v. King County*, 133 Wn.2d 565, 575, 947 P.2d 712 (1997). In *Newman*, a journalist made a public records request to the King County Department of Public Safety ("KCDPS") seeking access to records held in the Edwin Pratt murder file. Representatives of the KCDPS submitted declarations establishing that the investigation was still open and enforcement proceedings were contemplated. The court ruled that the investigative records exception required "the non-disclosure of information compiled by law enforcement and contained in an open and active police investigation file because it is essential to effective law enforcement." *Id* at 574. In support of its decision the court opined that "the documents requested cannot be disclosed because their release would impair the ability of law enforcement to share information and would inhibit the ability of police officers to determine, in their professional judgment, how and when information will be released."

Id. at 574. In camera review was not necessary because "this exemption allows the law enforcement agency, not the courts, to determine what information, if any, is essential to solve a case." *Id.* at 574-575. The application of this exemption to open, active investigations meets the requirements of the PRA to promote the act's public policy of disclosure while assuring that the public interest in the investigation of crimes is fully protected. RCW 42.56.030.

Mr. Sargent's case fits squarely within *Newman*: he requested an open, active law enforcement investigation and enforcement proceedings were contemplated. Mr. Sargent incorrectly asserts this case is controlled by *Cowles Publ'g Co. v. Spokane Police Dep't*, 139 Wn.2d 472, 987 P.2d 620 (1999). In *Cowles* this Court held that once an investigation has been closed, the suspect has been arrested, and the case referred to the prosecutor for prosecution, RCW 42.56.240(1) no longer acts as a categorical exemption preventing the release of the records maintained by an investigating agency. In Mr. Sargent's case, unlike in *Cowles*, the investigation was in the hands of the investigative agency, was open, active and an enforcement action was contemplated at the time of the request. This case fits within the holding of *Newman* and is distinguished from *Cowles*. In its role both as prosecutor of felonies and advisor to law enforcement, WAPA has an interest in insuring *Newman's* holding

remains clear – when an open, active investigation is in the hands of the investigative agency, either before or after rush filing, and an enforcement proceeding is contemplated, the investigative file is categorically exempt.

When a court considers the application of RCW 42.56.240(1) to investigative records, the key issue is whether the nondisclosure is essential to effective law enforcement. Under the circumstances of this case, nondisclosure is as essential to effective law enforcement as it was in *Newman*. The investigation is on-going, witnesses are still being interviewed, and the facts of the crime are still being determined.

If the Court rules that an open, active investigation is subject to release just because it was reviewed and declined by the prosecutor's office, there will be significant consequences. First, as noted by the Seattle Police Department, such a ruling would apply to every case where a warrantless arrest occurs. In such cases, the criminal rules require the investigation be given to the prosecutor for a rush filing decision. It is not hard to imagine an individual being arrested for a crime, being released because the prosecutor declined the rush filing, and submitting a public records request to the sheriff's office in order to gather information so he can coerce witnesses or destroy evidence. It is also not difficult to imagine a scenario where one person is arrested and it is later determined, during the open, active investigation after the prosecutor's decline that

another suspect is involved. Release of records in that scenario allows other non-arrested suspects information critical to an investigation. Investigation records in open investigations provide information and insight into the investigative agency's work product – their professional determinations as to the course the investigation should take, what investigative techniques are to be used, and their opinion as to what information should be shared with other law enforcement agencies and at what point the information should be shared. The release of this information is precisely the scenario the *Newman* court determined was best left to the professional opinion of law enforcement and the scenario *Cowles* does not address.

The operative fact in this case is that “*before* Sargent filed his first records request, the KCPA had returned the file for further work and SPD had resumed its investigation”. *Sargent v. Seattle Police Dep’t*, 167 Wn. App. 1, 14, 260 P.3d 1006 (2011) (emphasis added). At the time the request was submitted, the investigation was open, active, and an enforcement action was contemplated. In *Cowles*, the investigation was closed, the prosecution was proceeding, and the Court concerned itself with the integrity of the trial process. *Cowles*, 139 Wn.2d at 474-78. The same situation existed in *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 594-97, 243 P.3d 919 (2010). Mr. Sargent’s case was not in this position.

WAPA does not suggest that every time a case is declined for prosecution, RCW 42.56.240(1) acts as a categorical exemption. Rather, WAPA asserts it is essential to effective law enforcement that the investigative records not be released in this limited circumstance where the case has been declined, the investigation is open and active, and enforcement proceedings are contemplated when the request is received. At that point, the principles of *Newman* are in full effect and the categorical exemption applies.

VI. CONCLUSION

The Court of Appeals properly applied the law and correctly determined records in an open, active law enforcement investigation are categorically exempt under RCW 42.56.240(1), even when the prosecutor has considered the case and declined it for rush filing. This Court should affirm the Court of Appeal's ruling on this issue.

Respectfully submitted this 14th day of December, 2012.

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